

File Number:  
O-P

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U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 16 DAL  
LONDON, KY 40742-8300  
Phone: (972) 850-2300

RECEIVED JAN 11 2011

January 7, 2011

Date of Injury:  
Employee:

Dear Ms. :

The above-captioned case file has been returned to this office following the decision of the Hearing Representative dated 12/13/10.

Pursuant with the Hearing Representative's decision of 12/13/10, enclosed find our decision dated 01/07/11 rescinding our prior decision dated 04/27/10. Compensation has been reinstated at the total disability rate effect the date of the reduction (05/09/10). On 07/16/10 the Office issued a supplemental payment for the difference in payment and reinstated total disability payments

If you have any questions I may be reached at the number listed above.

Sincerely,

  
XAVIER SAAVEDRA  
Senior Claims Examiner

Enclosures

Notice of Decision dated 01/07/11

PAUL FELSER  
ATTORNEY AT LAW  
FELSER LAW FIRM, P. C.  
P.O. BOX 10267  
SAVANNAH, GA 31412

File Number:  
D-AC

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OFFICE OF WORKERS' COMP PROGRAMS  
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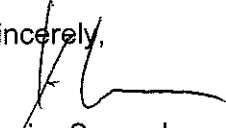
Date of Injury:  
Employee:

Dear Ms.

This letter is to advise you that the decision dated 04/27/10 has been rescinded. The basis for this action is discussed in the enclosed Notice of Decision. Your compensation payments will remain at the total disability rate effective the date of the reduction (05/09/10). On 07/16/10 the Office issued a supplemental payment for the difference in payment and reinstated total disability payments.

If you have any questions I may be reached at the number listed above.

Sincerely,



Xavier Saavedra  
Senior Claims Examiner

Enclosures: Notice of Decision

PAUL FELSER  
ATTORNEY AT LAW  
FELSER LAW FIRM, P. C.  
P.O. BOX 10267  
SAVANNAH, GA 31412

**NOTICE OF DECISION**

**Case Number:**

**Employee Name:**

**ISSUE:** The issue is whether the formal wage earning capacity decision issued on 04/27/10 should be modified (rescinded).

**REQUIREMENTS OF ENTITLEMENT:** A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>1</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</sup> Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.<sup>3</sup>

**BACKGROUND:** You were employed as a \_\_\_\_\_ for the \_\_\_\_\_. On \_\_\_\_\_ you filed a CA-1 Notice of Traumatic Injury Claim stating you sustained an injury to your left knee when you slipped and fell on the floor of the airport's common area.

Your work injury of \_\_\_\_\_ was accepted for the following condition(s): left closed fracture of lower end of femur; left reflex sympathetic dystrophy of lower limb; left venous thrombosis of other specified veins and left ankylosis of joint, lower leg.

On \_\_\_\_\_ you stopped work and were placed on the periodic compensation roll.

On \_\_\_\_\_ you had an open reduction and internal fixation of the left patella.

Upon receipt of work limitations from Dr. \_\_\_\_\_ your employing agency advised that they were unable to accommodate your work restrictions. Your case was then referred for vocational services on 05/08/09.

A rehabilitation counselor assigned to assist you reported your work and educational background as follows: You graduated from \_\_\_\_\_ and entered the \_\_\_\_\_. You joined the \_\_\_\_\_. You do not hold any licenses or certificates. Your employment history also included employment with the following employers: \_\_\_\_\_; \_\_\_\_\_; \_\_\_\_\_ with \_\_\_\_\_; \_\_\_\_\_; and a \_\_\_\_\_ for \_\_\_\_\_ in \_\_\_\_\_.

<sup>1</sup> 5 U.S.C. § 8115(a) (2006); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>2</sup> See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

<sup>3</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

Your assigned rehabilitation counselor recommended and identified target positions that was found vocational suitable as a Customer Service Clerk, D.O.T. #241.367-014; Billing Clerk, D.O.T. # 214.362-042 and a Hospital/Out Patient Admitting, D.O.T. #205.362-018.

In a report of examination dated 07/28/2009, Dr. \_\_\_\_\_ stated that you were partially disabled as a result of the employment injury. The report stated you could work with permanent restrictions with no lifting/caring over 15 lbs; no pushing/pulling over 15 lbs; limit your standing/walking/sitting to 2 hour shifts and no climbing stairs or ladders.

Your assigned counselor recommended placement services be provided beginning 06/30/2009; 90 days placement services were authorized and provided by your rehabilitation counselor. Placement services continued until 11/06/09.

In a final report dated 11/06/09 your rehabilitation counselor advised you had not obtained employment as a Customer Service Clerk, D.O.T. #241.367-014; Billing Clerk, D.O.T. # 214.362-042 or a Hospital/Out Patient Admitting, D.O.T. #205.362-018, however, he indicated that these positions were found to be vocationally suitable and were found in sufficient numbers so as to be reasonably available to you in your commuting area.

Of the positions identified by the rehabilitation counselor the wages of a \_\_\_\_\_ were closer to your date of injury earnings than the earnings of a | \_\_\_\_\_ were. Therefore, the position of a \_\_\_\_\_ was chosen for purposes of determining your wage earning capacity.

On 11/30/2009, you were notified that the evidence of file supports a finding that the position of a \_\_\_\_\_ was found to be medically and vocationally suitable for you and fairly and reasonably represented your wage earning capacity.

You were given 30 days to submit additional relevant evidence or argument if you disagreed with the proposed action.

In response to the Notice of Proposed Reduction, the Office received a 12/22/09 statement from you stating that due to your two work related injuries you have been unable to work due to complications related to Reflex Sympathetic Dystrophy. Because of your debilitating pain and the medication that you are on causes side effects and hinders you from being gainfully employed.

On 01/25/10 the Office received medical documentation from Dr. \_\_\_\_\_ stating that from an orthopedic standpoint your patella has healed and you are doing well; he opined that he did not think this was limiting your factor and you are essentially at maximum medical improvement. However, he wanted to give you more time to work on your Reflex Sympathetic Dystrophy because it significantly limits you with regard to your functions. In this report he also stated that he would see you back in six months in which time Dr \_\_\_\_\_ would have modalities from a pain management standpoint.

On 03/18/10 the Office sent a letter to Dr. \_\_\_\_\_ regarding your Reflex Sympathetic Dystrophy asking that he provide his medical opinion evidence regarding your condition. He was also provided with a OWCP-5 Form.

On 04/27/10 the Office finalized its proposed reduction.

## DISCUSSION OF EVIDENCE:

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.<sup>4</sup>

The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>6</sup> Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.

As the Office had not received Dr. \_\_\_\_\_ response to our development letter prior to the issuance of the final reduction, the Office did not meet its burden in finding that the position of \_\_\_\_\_ fairly and reasonably reflected your wage earning capacity. Therefore, the final determination was erroneous and meets the requirement for modification.

## BASIS FOR DECISION:

"The Federal Employees' Compensation Act specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained."<sup>7</sup>

## RECOMMENDATION:

The decision dated 04/27/10 is rescinded by the Director's own motion as the Office did not meet its burden of proof in demonstrating that the Position of \_\_\_\_\_ reflects your wage earning capacity. Compensation payments will remain at the total disability rate effective the date of the reduction (05/09/10).

Xavier Saavedra  
Senior Claims Examiner  
January 7, 2011

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *John W Butler*, 39 ECAB 852 (1988).

<sup>7</sup> 20 C F R § 10.610 (1999).